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IN THE

Supreme Court of the United States

October Term, 1970

No. 78

ATLANTIC CITY ELECTRIC COMPANY, *et al.*,
Appellants

v.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF APPELLANTS

Opinion Below

The opinion of the District Court is reported at 306 F. Supp. 338, and appears at Consolidated Appendix (C.A.), p. 153a. The interim and final decisions of the Interstate Commerce Commission ("ICC" or "Commission") are reported at 332 I.C.C. 590 and 332 I.C.C. 714, respectively. They appear at C.A. p. 248a and C.A. p. 281a, respectively.

Jurisdiction

The order of the District Court was dated October 28, 1969 and was entered on that day. The notice of appeal from that order was filed in the District Court on December 18, 1969. The Jurisdictional Statement was filed January 16, 1970 and this Court noted probable jurisdiction on May 18, 1970. The jurisdiction of this Court rests on 28 U.S.C. §§1253 and 2101(b).

Statutes Involved

Sections 1253, 1336, 2101(b), 2284 and 2321-2325 of Title 28, U.S.C., the Administrative Procedure Act, 5 U.S.C. §§ 556(d) and 556(e); Judicial Review, 5 U.S.C. §§ 701(a), 702, 703, 704, 706; the Interstate Commerce Act, Sections 1(5), 3(1), 13, 15(1), 15(7), 15a(1) and (2), 17(3) and 17(9), 49 U.S.C. §§ 1(5), 3(1), 13, 15(1), 15(7), 15a(1) and (2), 17(3) and 17(9); as amended, are set forth in the Appendix to this brief.

Question Presented

Does immunity from judicial review attach to the procedures followed by the ICC during an investigatory hearing on a general rail rate increase, and to the final order deciding issues raised therein?

Statement

The controversy before the Court arose from an order of the Interstate Commerce Commission (C. A. pp. 281a to 398a, 332 I.C.C. 714) dated January 9, 1969 which authorized the railroads of the United States to increase their rates for the transportation of virtually all of the nation's freight, by percentages varying from 3% to 10% on different commodities, and sometimes varying on the same commodities from different regions.

Appellant* electric utility companies ("Utility Appellants") filed a complaint in the United States District Court for the Southern District of New York seeking a permanent injunction against the Commission's January 9th order. The United States was joined as a mandatory defendant but took no active part in the proceedings in the court below. The Appellants, the State of New York (on behalf of its citizens engaged in agriculture), and the Departments of Agriculture of the States of Maine, New Hampshire, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Rhode Island, Maryland and Massachusetts ("State Appellants") moved to be permitted to intervene as plaintiffs, and the Class I railroads of the United States ("railroads"), moved to be permitted to intervene as defendants. Both motions were granted.

Utility Appellants' complaint (C.A. pp. 3a et seq.) recited the history of the proceeding before the Commission, to wit:

> In March, 1968, the defendant railroads filed with the Commission "Master Tariff X-259" which provided for rate increases on virtually all commodities carried by the railroads (¶6, C.A. pp. 5a-6a),** such increases varied by commodity, and in some instances, by region from 3% to 10% (¶6, C.A. pp. 5a-6a). After receiving numerous protests; by order of June 19, 1968 (¶6, C.A. pp. 5a-6a) the ICC permitted an interim increase of 3% on all commodities, suspended the

* The Utility Appellants here are Atlantic City Electric Company, Niagara Mohawk Power Corporation, Public Service Electric and Gas Company, and Rochester Gas and Electric Corporation. Two of the Appellants below, Central Hudson Gas & Electric Corporation and Orange and Rockland Utilities, Inc., are not taking part in this appeal because, subsequent to the ICC order raising freight rates and the decision below holding that action unreviewable, they ceased to ship substantial quantities of fuel by rail.

** Numbers refer to paragraphs in Utility Appellants' complaint; additional facts set forth in State Appellants' complaint follow.

tariff; and ordered investigatory hearings on the proposed increases (¶6, C.A. pp. 5a-6a):

At those hearings, to which plaintiffs and intervening plaintiffs were parties, there was no evidence presented in support of the justness and reasonableness of the proposed rates. The Commission itself took no part in the proceedings it conducted, never by its Staff or counsel examining into the justness and reasonableness, or any other aspects, of the proposed increases (¶9, C.A. p. 7a). No bureau, section or employee of the Commission was a party to the proceedings, or appeared therein to testify, nor was there any representation of the national consumer interest by the Commission through its counsel or otherwise (¶10, C.A. p. 7a).

There was no evidence presented by the railroads as to their costs for providing the transportation services for any commodity, although such evidence was requested by plaintiffs, intervening plaintiffs and many other parties to the proceedings. All such requests were repeatedly refused by the railroads and such refusals were upheld by the Commission (¶12, C.A. p. 8a). There was no evidence in the record to refute evidence presented by shippers that the railroads would incur substantial loss of traffic if the proposed increases became effective (¶13, C.A. p. 8a)*.

* Subsequent history has demonstrated the accuracy of plaintiffs' allegations. The increases which the Commission approved on the traffic of the original eleven plaintiff utilities who opposed the railroads before the ICC were intended to produce additional revenue of $2.7 million annually. However, those increases in fact resulted in an actual loss of $12.6 million in annual revenues to the railroads because six of those companies ceased to ship large volumes of coal, due in large part to the lower delivered price of fuels not using rail transport. Freight charges constitute approximately one half of the delivered cost of coal in the northeast. It is apparent, therefore, that the Commission's constant accession to the railroads' demands for increased rates (requests were filed and approved in 1967, 1968, 1969 and 1970) has failed, at least on some major traffic, to produce increased revenues and has contributed substantially to the present plight of the railroads.

There was no evidence presented by the railroads to justify their requested increases of 3% on some commodities, 5% on others, and 10% on still others (¶14, C.A. p. 9a). However, there was substantial and uncontroverted evidence presented by shippers, including plaintiffs and intervening plaintiffs, that some commodities, prior to the imposition of the requested increases, produced a disproportionate return to the railroads over and above the cost to them for providing the transportation service for that traffic (¶14, C.A. p. 9a).

In addition to the general findings which the Commission made with respect to all increases, it also made specific findings with respect to many commodities, including bituminous steam coal, feed and grain (¶13, C.A. p. 8a). It based its findings as to the effect of the proposed rates on the movement of coal traffic on its opinion that "costs of other forms of transportation, and of competing fuels are also increasing" (¶13, C.A. p. 8a), for which opinion there was no supporting evidence; and upon the explicit assumption that "should a competitive situation arise, appropriate adjustments can be made by producers and carriers", although there was not a scintilla of evidence in the record to support the assumption that "adjustments can be made" by coal producers, who, of course, are not subject to ICC jurisdiction (¶13, C.A. p. 8a).

As to grain, the Commission refused to consider a cost study submitted by State Appellants, which demonstrated that that traffic showed a disproportionately high contribution to rail revenues before the requested increases were imposed upon it. (Intervening plaintiffs' complaint, ¶10(a), C.A. p. 40a.)

The Commission's order holding that intervening plaintiffs suffered no undue prejudice was based on a misconception concerning the percentage increase authorized in other regions. (Intervening plaintiffs' complaint, ¶ 10(c), C.A. pp. 40a-41a.)

For the purpose of the ICC's motion below, all of the above facts alleged in the complaint were admitted, since the Commission moved under Rule 12(b) of the Federal Rules of Civil Procedure to dismiss plaintiffs' complaints. It is submitted that the court below, in granting the ICC's motion, failed to apply correctly the relevant statutes to the facts herein, and committed error in refusing to allow these utilities, the State of New York, and the Departments of Agriculture of the northeastern states to present their case.

Summary of Argument

An order of the ICC, entered after suspension of and investigation into the railroads' proposed increased freight rates, is ripe for judicial review under the principles of reviewability enunciated by this Court in the *Abbott Laboratories*, 387 U.S. 136 (1969), *City of Chicago*, 396 U.S. 162 (1969), *Data Processing*, 397 U.S. 150 (1969) and *Barlow*, 397 U.S. 159 (1969) decisions. No administrative remedy remains to Appellants, who were immediately, directly and adversely affected by the ICC order. No "clear and convincing evidence" (*Abbott Laboratories*, at 141) in the relevant statutes precludes judicial review. In fact, unambiguous, pertinent provisions in the Judicial Code (the Urgent Deficiencies Act of 1913, 28 U.S.C. §1336) and the Administrative Procedure Act provide for review.

The alternative presented to the Court by Appellees—that Appellants should file a complaint in the ICC pursuant to Section 13 of the Interstate Commerce Act—is no substitute for judicial review because:

1. No review of the Commission's procedures in arriving at its order in the general revenue proceeding may be had in a Section 13 action, as the Commission itself has specifically held;

2. Although under the Administrative Procedure Act and § 15(7) of the Interstate Commerce Act it is the duty of the carrier to prove that proposed increased rates are just and reasonable, in a Section 13 proceeding the burden of proof would be transferred to a shipper to prove that the increased rates are unjust and unreasonable; and

3. Section 13 is directed to obtaining relief from a carrier, not from the Commission.

The decision of the court below should be reversed and that court should be directed to hear Appellants' complaints on the merits.

ARGUMENT

Should this Court affirm the decision of the court below, it will have denied to these Appellants, and indeed to all the nation's consumers of railroad-transported commodities, the right to obtain any judicial review of the procedures followed and orders issued by the ICC in permitting increases in railroad freight rates. Under the existing statutes (see 28 U.S.C. §1336, *infra*, p. A-1), a three-judge district court is the only forum that can review the Commission's procedures and orders.* There are no administrative remedies remaining to Utility and State Appellants by which these procedures and order can be reviewed.

The railroads urged dismissal of Appellants' complaints on the grounds that shippers may not obtain judicial review of their specific freight rates when those rates

*There is no contention that Appellants had not complied with the procedures set forth in 28 U.S.C. §§2321-2325 (see, *infra*, p. A-3), regarding actions in district courts to enjoin ICC orders.

have been approved by the ICC in a "general revenue" proceeding which also set rates for all commodities. This argument is based upon a characterization of these complaints which constitutes a fundamental misinterpretation of those complaints and which resulted in the court below mistaking their true nature. The complaints did not seek review of coal and grain rates; they sought review of the legality of the procedures followed by the ICC in arriving at its order permitting those rates to become effective. Appellants sought a determination whether the order had the evidentiary basis required by law, and whether the procedures followed by the ICC in arriving at the conclusions expressed therein were in conformity with applicable legal standards.

I.

The Urgent Deficiencies Act of 1913 and the Administrative Procedure Act Provide for Review

The Urgent Deficiencies Act, now embodied in 28 U.S.C. § 1336 (*infra*, p. A-1) provides that United States District Courts have jurisdiction of any civil action to enjoin any order of the ICC.

The Administrative Procedure Act (5 U.S.C. §702, *infra*, p. A-6) provides that a person adversely affected or aggrieved by agency action is entitled to judicial review thereof.

Utility Appellants obviously are adversely affected by the ICC's order which permitted the railroads to increase freight charges to them by some $1.5 million annually. State Appellants are adversely affected by the order which tends to favor the agricultural products of the southeastern states over those of the northeastern states. Both groups of Appellants assert that all such increases were

illegally imposed, since permission to file them was granted after a hearing during which no evidence was presented by the railroads, or required by the Commission, that the increased rates would be just and reasonable; and during which the railroads were not required by the ICC to sustain their burden of proof as that burden is imposed on them by the Interstate Commerce Act and the Administrative Procedure Act.

The Administrative Procedure Act (5 U.S.C. §706, p. A-7, *infra*) empowers the reviewing court to hold unlawful and to set aside agency action which is found to be contrary to constitutional right, unsupported by substantial evidence, or without observance of procedures required by law. As noted above, Appellants' complaints charge that the Commission's actions meet all these criteria of unlawfulness and should therefore be reversed. The factual accuracy of Appellants' complaints was necessarily admitted by the motion below.

II.

Prior Decisions of This Court Have Held Similar Agency Actions Reviewable

During its October 1969 term, this Court decided three cases which directly support Appellants' right to a review of the ICC action complained of. In each of those cases, the Court found that the agency's actions were subject to judicial review.

The first of these cases was *City of Chicago* v. *U. S.*, 396 U. S. 162 (1969), where Mr. Justice Douglas, writing for a unanimous Court, stated that the question was:

> "whether orders of the Interstate Commerce Commission discontinuing investigations • • • are judicially reviewable on the complaint of aggrieved persons."

The Court concluded that such orders were judicially reviewable, reversing the contrary decision below.

In that case, certain railroads had filed notices of discontinuance of various interstate passenger train services, and the Commission found, after conducting an investigatory hearing, that continued operation of the trains was not required by the public convenience and necessity and that such continued operation would unduly burden interstate commerce. It thereupon entered an order terminating its investigation of the proposed discontinuances and permitting them to become effective.

The same basic procedure was followed by the ICC in the instant case: its final order herein (see C.A. pp. 281a to 398a) terminated its investigation into the increased tariffs and permitted them to become effective.

The Court held in *City of Chicago:*

> "A decision to investigate indicates that a substantial question exists under the statutory standards. The Commission's report therefore deals with the merits. We cannot say that an answer that discontinuance should not be allowed is agency 'action,' while an answer saying the reverse is agency 'inaction.' The technical form of the order is irrelevant. In each case the Commission is deciding the merits." 396 U. S. at 166.

The Court analogized to situations such as the instant case, where new rates have been filed, stating:

> "When carriers file new rates, the Commission has authority on its own initiative or on complaint to make an investigation either with or without suspension of the new rates. 49 U.S.C. § 15(7). Where the Commission finds the proposed rates lawful, its order reads: '[T]he investigation proceedings [are] discontinued.' * * * *Such orders are reviewable* * * *.*" (396 U. S. at 166, fn., emphasis added.)

The railroads in their briefs in the course of this appeal have failed to distinguish their posture here from the position described in *City of Chicago*. Instead they have contented themselves with merely stating that orders of the Commission in general revenue proceedings are unreviewable because of the "circumstances" (p. 14, Motion to Affirm) surrounding them. However, neither the Interstate Commerce Act nor the Administrative Procedure Act lists any relevant "circumstances" which would authorize an exception here from the availability of judicial review of this ICC action.

In two companion cases decided March 3, 1970, *Association of Data Processing Service Organizations, Inc.* v. *Camp, Comptroller of the Currency* (397 U. S. 150), and *Barlow* v. *Collins, Executive Director, Alabama Agricultural Stabilization and Conservation Service* (397 U. S. 159), this Court held agency actions judicially reviewable, because, as in the case at bar, the petitioners were aggrieved by agency action and the relevant statutory provisions contain no language to rebut the presumption of reviewability.

In the *Data Processing* case, the petitioners challenged a ruling* of the Comptroller of the Currency (applicable only to banks) that national banks could make data processing services available to other banks and to bank customers, alleging, *inter alia*, that competition by national banks in the business of providing data processing services might result in some future loss of profits to the petitioner. The Court held that such action of the Comptroller was review-

* It is noted that the ruling was clearly permissive in nature, but was nevertheless the subject of judicial review. The railroads and the ICC claimed below that the ICC's order herein was not judicially reviewable, because of its permissive nature. We note that the railroads in their Motion to Affirm herein (p. 14) have abandoned that argument.

able under the terms of the Administrative Procedure Act, since it could find no evidence that any statute "preclude[d] judicial review", the test of § 701(a) of the Administrative Procedure Act, as that statute has been interpreted by the Court in *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967). The Court held that there "is no presumption against judicial review and in favor of administrative absolutism [citing *Abbott*] unless that purpose is fairly discernible in the statutory scheme" (387 U. S. at 157). The Court could find no such evidence in the statutory scheme of the "relevant statutes" (the Bank Service Corporation Act or the National Bank Act), and held that petitioners, as competitors of national banks, were within the class of "aggrieved" persons who are entitled to judicial review of agency action under § 702 of the Administrative Procedure Act.*

In the companion *Barlow* case, tenant farmers challenged an amended regulation of the Secretary of Agriculture which made it possible for landowners to demand the assignment to them of money made available under the Federal "Upland Cotton Program" as a condition to obtaining a lease to work the land. This Court held that the petitioning tenant farmers had the "personal stake and interest" required by Article III of the Constitution, and were clearly within the zone of interests protected by the Food and Agriculture Act of 1965. The Court also found that judicial review of the Secretary's action was not precluded by the relevant statutes. The Court again

* Here, the railroads argued below that judicial review should be denied plaintiffs because they had suffered no "legal wrong". (See C.A. p. 81a-84a.) The Court in *Data Processing* clearly held that whether a legal wrong had been suffered or a legal interest invaded was a question going to the merits of the action and should not be determinative of the threshold questions of jurisdiction and standing to sue (397 U. S. at 158).

referred to its language in *Abbott Laboratories* (387 U. S. 136, 141) that it is "'only upon a showing of "clear and convincing evidence" of a contrary legislative intent' that the courts should restrict access to judicial review" (397 U. S. 159 at 167).

As noted above, the Utility Appellants are clearly "persons aggrieved" since they were made subject by ICC order to a liability to pay some additional $1.5 million annually in increased freight charges, which the ICC gave permission to the railroads to make effective after a hearing in which no evidence was adduced as to whether such rates would be "just and reasonable" as required by 49 U.S.C. § 1(5) and 49 U.S.C. § 15(7) (pp. A-8 and A-13, *infra*). Similarly, State Appellants are clearly "aggrieved" because the ICC's order places the agricultural products of the northeastern states at a disadvantage compared with those of the southeastern states.

There is no "clear and convincing evidence" that judicial review is precluded here. Indeed, as noted above, the applicable statutes provide that three-judge courts have jurisdiction of any suit seeking to enjoin an order of the Interstate Commerce Commission.

In *City of Chicago*, the Court relied on its earlier decision in *Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125 (1939), which was an appeal from a final decree by a three-judge district court dismissing on the merits a bill to review an order of the Federal Communications Commission, which order had found Rochester subject to FCC jurisdiction. Justice Frankfurter, writing for the Court, found that the FCC order was reviewable although such order did not compel any action by Rochester, because it:

> "was not a mere abstract declaration regarding the status of the Rochester under the Communications Act [footnote omitted], nor was it a stage in an

incomplete process of administrative adjudication." (307 U. S. 125, 143.)

The judgment rendered was a "final and indisputable basis of action as between the Commission and the defendant" (307 U. S. 125, 143). In the instant case, the ICC found that the general level of rates was just and reasonable and would not adversely affect the movement of traffic, findings which were the "final and indisputable basis" of its action in permitting the railroads to collect the increased rates.

Justice Frankfurter noted that such an order as that of the FCC in *Rochester Telephone* was reviewable to determine "questions affecting constitutional power, statutory authority and the basic prerequisites of proof" (307 U. S. 125, 140). Those are the very questions these Appellants sought to have reviewed below in the three-judge District Court.

The scope of reviewability set in the *Rochester* case was expanded by two other cases also decided prior to the *City of Chicago, Barlow* and *Data Processing* decisions, *supra*. These cases also arose under the Urgent Deficiencies Act. They are *Columbia Broadcasting System* v. *U. S.* 316 U. S. 407 (1942), and *Frozen Food Express* v. *U. S.*, 351 U. S. 40 (1956).

In the *Columbia Broadcasting System* case, the Federal Communications Commission had issued a rule providing for the non-renewal or revocation of licenses of stations whose contracts with a broadcasting network contained certain proscribed conditions. The Court held the FCC regulation to be a reviewable "order", even though it did not formally apply to CBS, and no contracts or licenses had been cancelled. In deciding that review was possible despite this seeming lack of finality, the Court said:

"Here the Commission exercised its rule-making power by adopting regulations whose operation is not

made subject to future administrative determinations, save only as the Commission may be called on to decide in any given case whether a station's contract with a network is within the regulations. The regulations' applicability to all who are within their terms does not depend upon future administrative action. Instead, they operate to control such action and to determine in advance the rights of others affected by it." (316 U. S. 407, 420.)

In *Frozen Food Express,* the express company, a motor carrier not a party to the prior administrative proceeding, instituted a suit in a statutory three-judge court to have the findings and order of the Interstate Commerce Commission enjoined and set aside. The findings related only to the status of certain agricultural commodities which Frozen Food often carried. The order would have made it necessary for Frozen Food to obtain a certificate of public convenience and necessity, where before the order its carriage was exempt. The mere possibility that the Commission might issue a cease-and-desist order (even though that order itself would be reviewable) and the legal consequences thereof were held by the Court to make this determination a reviewable order.

III.

Relief Sought By Appellants is Unavailable in a Section 13 Proceeding

The railroads and the ICC argue that Appellants' protection of their interests is provided through the privilege of filing a Section 13 complaint. This, they assert, is "clear and convincing evidence" of non-reviewability of the instant order of the ICC. Their argument includes several

fundamental errors. In the first place, Section 13 provides that:

> "Any person * * * complaining of anything done or omitted to be done *by any common carrier* subject to the provisions of this chapter * * * may apply to [the] Commission * * * whereupon a statement of the complaint * * * shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint * * *." (Italics added.)

It is thus clear that a Section 13 proceeding seeks redress from an unlawful act of a *carrier*. Appellants are seeking redress from the *Commission*, not from any carrier.

Thus it is patently fallacious to argue that the statute by reason of Section 13 constitutes "clear and convincing evidence" that Congress intended to deny judicial review to Appellants. Indeed, in the one action where shippers attempted under Section 13 to obtain review of the Commission's order in a general revenue proceeding, the Commission squarely held that they had chosen the wrong route:

> "The complainant introduced in evidence a series of exhibits containing certified copies of the record in the Ex Parte No. 175 proceeding bearing upon the level of the water-transportation costs as between the New England and the New York ports. In this manner, it purports to attack our order in that proceeding. Admittedly, the variances in the assailed proportional rates stemmed from our general authorization in that proceeding, but *whether or not the permissive order entered was justified based on the evidence of record therein is not a relevant consideration in the instant proceeding.*" (*Koppers Co., Inc.* v. *Chesapeake & O. Ry. Co.*, 303 I.C.C. 383, 387 (1958); italics added.)

It is submitted that the decision of the Commission in the *Koppers* case was correct. Whether or not its prior "permissive order" permitting the rate increases to be put into effect was procedurally proper and supported by substantial evidence, it was unquestionably within the ICC's jurisdiction to issue such order. Therefore, the action of the carrier in increasing its rates pursuant to the order was not one which could be complained of by a collateral attack on the general order in a Section 13 proceeding. All that the shippers can do under Section 13 is to attack the justness and reasonableness of specific rates permitted to be put into effect by the general order. A Section 13 proceeding would not involve any review of the evidence or procedures leading to the prior general order.

For example, despite the fact that it is well established that the Commission is the guardian of the public interest in these general revenue proceedings, the Commission itself took no part in the proceedings other than to sit by "merely call[ing] balls and strikes" between the necessarily unmatched advocates before it. Motions were made to join the Commission's Bureau of Accounts, which motions were denied, and no bureau, section member, counsel or other employee of the ICC was a party to the proceeding before it. It is thus clear that the public interest was accorded no protection whatsoever by the Commission in the Ex Parte 259 hearings.

The Commission has only recently been exhorted by the Supreme Court of the United States to better protect the public interest. *Baltimore & Ohio Railroad Co.* v. *U. S. et al.*, 386 U. S. 372 at 436 (1967), Brennan, J., concurring opinion:

> "Ultimately, however, the reason reliance upon the estimates of railroads of their own best interests is

> objectionable is simply that the *best interests* of the *railroads are not necessarily consistent with the public interests, and it is the latter which the Commission is directed to advance.* . . . The commendable industrial statesmanship demonstrated by the railroads on many occasions in these recent proceedings only serves, because of the cohesion this demonstrates . . . to aggravate the danger that 'grows out of the tendency of these giant corporations to compromise their own differences at the expense of the unorganized public', 2 Davis *op. cit. supra* [Admin. L.] n. 21, at 378. The regulatory agency must be the bulwark against such compromise. It is 'a requisite for administrative viability that "[t]he outlook of the Commission and its powers must be greater than the interest of the railroads, or of that which may affect those interests.' *I.C.C.* v. *Chicago, R.I. & P.R. Co.*, 218 U. S., 88, 103." (Footnote omitted, emphasis supplied.)

In that same concurring opinion, Justice Brennan also said (at 429):

> "The ICC is pre-eminently an agency 'directly and immediately concerned with the outcome of virtually all proceedings conducted before it. It is not intended to be a passive arbiter but the "guardian of the general public interest," with a duty to see that this interest is at all times effectively protected.' H.R. Doc. No. 678, Practices and Procedures of Governmental Control of Transportation, 78th Cong., 2d Sess., p. 53 (1944); see *Southern Class Rate Investigation*, 100 I.C.C. 513, 603. It is empowered to investigate and gather evidence beyond that presented by the parties where exercise of that power will advance the determination of what best

> serves the public interest.* "To the same end, the agency has wide latitude in fashioning procedures, and a broad power to condition its approval of proposals. In other words, the ICC is not the prisoner of 'the parties' submissions.**'"

Interstate Commerce Commissioner Aitchison's statements concerning the obligations of administrative agencies to themselves develop an adequate record, as set forth in the Senate Subcommittee Hearings on S. 674, S. 675 and S. 918, 77th Cong., 1st Sess., Apr. 29, 1941, 412 at 465-6, have been quoted with approval by a Federal Court of Appeals and by a Federal District Court:

> "They [administrative agencies] are not expected merely to call balls and strikes, or to weigh the evidence submitted by the parties and let the scales tip as they will. The agency does not do its duty when it merely decides upon a poor or nonrepresentative record. As the sole representative of the public, which is a third party in these proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in. . . . The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible . . ."

* "'A regulatory body such as the Interstate Commerce Commission cannot properly discharge its duty if it remains ignorant of relevant facts simply because they were not introduced in evidence. The Commission should itself supply deficiencies in the record. It should bring to light material which the parties have either overlooked or have willfully failed to call to its attention. It should aid those parties who through lack of resources are unable adequately to present their cases. It should make full use of the expert knowledge of commissioners and staff, and of the mass of transportation information that it has accumulated through the years.' H.R. Doc. No. 678, *supra*, p. 70. See *Eastern-Central Motor Carriers Assn. v. United States*, 321 U.S. 194, 208-210, 212, 216-217." (Footnote in original).

** Footnote omitted.

Isbrandtsen Co. v. *U. S.*, 96 F. Supp. 883 at 892 (SD.N.Y. 1951, affd. 342 U. S. 950, 1952); and see *Scenic Hudson Preservation Conf.* v. *F.P.C.*, 354 F. 2d 608 at 621 (2d Cir. 1965), *cert. den.* 384 U. S. 941 (1966).

In the latter case, the FPC staff had taken an active part in the hearings before the examiner, had presented witnesses of its own, cross-examined applicant's and intervenors' witnesses, and submitted briefs and exceptions to the examiner's decision, but the FPC was nevertheless reversed by the court for not testing and supplementing evidence presented by the parties adequately to protect the public interest.

On this same point of the Commission's affirmative duty, in *Aberdeen & Rockfish R. Co.* v. *U. S.*, 270 F. Supp. 695 (E.D. La. (1967), affd. as modified, 393 U. S. 87 (1968)), the court quoted with approval the language of another District Court as follows:

> "'The [Interstate Commerce] Commission is not a passive arbitrator of disputes between carriers. It is the instrument chosen by Congress to regulate interstate commerce in the public interest. When carriers fail to produce satisfactory evidence, the Commission may require them to produce additional and more satisfactory evidence. It may make its own investigation. It may consult with "other interrested and presumably better informed agencies of the Government as to particular question [*sic*]." Cantlay & Tanzola, Inc. *v.* United States, [D. C.,] 115 F. Supp. [72,] 81. However, the record does not disclose that any of those courses was followed in this case. *The fate of our national transportation system should not depend upon evidence either offered or withheld by competing carriers.*'" (Emphasis added by the court.) 270 F. Supp. 695, 711.

> "There is no doubt as to the Commission's statutory powers to require the development of adequate and comparable cost data. Section 12(1) of the Interstate Commerce Act authorizes the Commission to 'obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of the [Act]' (49 U.S.C. §12(1)). Section 20(1) of the Act expressly grants the Commission the power 'to require . . . special reports from carriers' and to require the carriers to provide 'full, true and correct answers to all questions upon which the Commission may deem information to be necessary' (49 U.S.C. §20(1)). This power was sustained in *Baltimore & O. R. Co.* v. *ICC*, 221 U. S. 612, 621 (1911)." *Id.* at 712.

The failure of the Commission to adequately protect the public interest in *Ex Parte 259* is clearly not reviewable under a Section 13 proceeding.

To fully appreciate the difference between judicial review of the order below and filing a complaint in a Section 13 proceeding, it should be borne in mind that Section 15(7) of the Interstate Commerce Act (p. A-13, *infra*), requires that at any hearing involving a change in rate, the burden of proof be upon the carrier. Similarly, §556(d) (p. A-5, *infra*) of the Administrative Procedure Act requires that the burden of proof be sustained by the proponent of an order. Should Appellants be remanded to a Section 13 proceeding, the burden of proof, which both the relevant statutes placed upon the railroads in the proceeding below, would be shifted to shippers and their state representatives. In other words, although on the facts deemed admitted, the railroads have failed to sustain their statutory burden of proof that the proposed rates would be just and reasonable, they and the Commission now contend that the shippers' right to review is limited to bring-

ing a proceeding in which the shippers have the burden of showing that the increased rates are *un*just.

There is no provision in the applicable statutes that general revenue proceedings are exempt from the statute (§15(7)) requiring carriers to prove that the proposed increases will result in just and reasonable rates which will not adversely affect the movement of traffic. When the railroads failed to produce any evidence on these issues, Appellants requested, at various times throughout the proceedings, that the presentation of such evidence be compelled (¶12, Utility Appellants' complaint, C.A. p. 8a). All such requests were denied by the ICC's presiding examiners.

Thus, there is no reason to believe that if Appellants filed a Section 13 complaint, the cost data necessary to make out their *prima facie* case would be available to them. This evidence is in the exclusive possession of the railroads and is filed on a confidential basis with the Commission's Bureau of Accounts. Therefore, the shift in the burden of proof from the carriers to the Appellants which occurs in a Section 13 proceeding is of great importance. It is highly doubtful that Appellants could present a *prima facie* case without such relevant evidence.

Moreover, in any such proceeding, Appellants would be forced to prove that the findings underlying the Commission's January 9th order were in error—a most difficult task indeed if the Commission should be first assured in this proceeding that that order is immune from judicial review.*

*The orders reviewed by this Court in the *CBS* and *Frozen Food* cases, *supra*, were general orders. In each of those cases, Appellants could have sought a determination by the agency involved as to the specific applicability of the general order to them. Despite that fact, however, this Court held that review of the general orders was available.

In a recent decision, the Court of Appeals for the District of Columbia, Burger, J., writing the opinion, admonished the Federal Communications Commission in very strong terms that it had a duty to see that the burden of proof was borne by the proper party and sustained by it. See *United Church of Christ v. FCC*, 1965 *et seq.*, [Federal] *C.C.H.* Util. L. Rep. ¶11069 (D.C. Cir. June 20, 1969).

IV.

The *Algoma* Line of Cases is Not Controlling

The railroads and the ICC have placed great stress herein on three cases referred to during the course of these proceedings as the "Algoma" line.* In *Algoma Coal and Coke* and two subsequent cases, plaintiffs were shippers seeking judicial review of their specific rates, approved in a general revenue proceeding. The courts refused such review, properly regarding rate-making as an exclusive Commission function. The court below in the instant case also relied upon the *Algoma* doctrine in reaching its decision.

Whether or not the *Algoma* doctrine is correct, it is applicable only if a complaint seeks to review the justness and reasonableness of specific rates. However, Appellants' complaints here do not relate to specific rates—but to the propriety of an ICC general revenue order lacking the statutory prerequisites. They challenge the legality of that order and of the proceedings before the Commission. They assert that nobody, including the Commission, on the evidence presented to it, could decide whether any or all

* *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va., 1935); *Koppers Co.* v. *United States*, 132 F. Supp. 159 (W.D. Pa., 1955), and *Florida Citrus Commission* v. *United States*, 144 F. Supp. 517 (N.D. Fla., 1956), *aff'd. per curiam*, 352 U. S. 1021 (1957).

rates should be increased. Appellants allege that all the increased rates are illegal because the Commission has a statutory preliminary duty to find, based on proper evidence presented by the carriers, that rates which it permits to become effective are just and reasonable, and will not result in diversion of traffic.

The dissenting opinion of Circuit Court Judge J. Skelly Wright in the *Alabama* case (No. 106, consolidated with the instant case for briefing and argument), supports the contentions both of Appellants in that case and in the instant case. Judge Wright found that "plaintiffs here are not seeking to challenge the appropriateness of any rate or combination of rates. Instead, they wish to challenge the propriety of a Commission order which allowed the rates generally to be raised by the carriers." (C.A. p. 217a.) The order of the Commission, Judge Wright maintained, "must be based on substantial evidence" (C.A. p. 217a). Citing the Urgent Deficiencies Act, Judge Wright went on to give as his opinion that the order was "of course" judicially reviewable, and, furthermore, "now" ripe for review (C.A. p. 217a).

Judge Wright concluded that both *Algoma* and *Florida Citrus* sanctioned this "threshold" type of review, and a close examination of those cases supports Judge Wright's conclusion. In both, the reviewing courts examined the evidence to determine if the Commission had acted properly. Neither of the courts below in No. 78 or No. 106 has looked into the merits of the case before it; they have merely dismissed both actions on the grounds that the Commission's order is not judicially reviewable.

V.

Additional Arguments Against Reviewability are Without Substance

A. "Legality" of Approved Rates

The railroads in their Motion to Affirm argued that the Commission's order "merely found in a preliminary way that an overall increase in rates is not unreasonably large", and that the Commission did not find that "any particular rate as so increased is necessarily lawful" (Motion to Affirm, p. 5). Similar language is found throughout the Motion (see, e.g., pp. 8, 9 and 15).

This is not an accurate statement. The Commission found the proposed increases to be "just and reasonable" (332 ICC at 791, C.A. p. 391a); that the increased rates "will not exceed a maximum reasonable level" (332 ICC at 792, C.A. p. 393a), and that they "will have no undue adverse effect on the movement of traffic." The Commission's order complies on its face with the statutory requirements. Nothing further remains to be done to meet the test for finality of administrative action. The increased rates are in effect pursuant to Commission authorization. A shipper attacking any specific increased rate has the burden of proof to show not only that the rate is unjust and unreasonable, but that the Commission's findings on that issue are in error. There is nothing "preliminary" about the Commission's order—entered after an investigation and suspension; it is a final order establishing nationwide rates.

B. The Railroads' Need for Immediate Relief

The Department of Justice, in its memorandum urging this Court to take jurisdiction of these appeals pointed out that "serious problems would be presented to the

railroads, particularly those in precarious financial condition, if across-the-board interlocutory relief were given against rate increases as an incident of reviewability. A temporary restraining order or preliminary injunction staying a Commission general revenue order ultimately held valid could result in the loss of large amounts of urgently needed rail revenues." The Department has thus focused on a problem which, while not directly before the Court because of the nature of the decisions below, may be considered by the Court in deciding the narrow legal issue of reviewability.

The problem may not be as severe as presented.* Increased rates do not, *ipso facto*, increase the railroads' revenues. Only traffic moving at increased rates increases revenues. When the railroads allege that permitting certain rate hikes will result in increased revenues of, say, $466 million (as they did in Ex Parte 259), and the Commission permits rates to go into effect to produce that amount of revenue, a fundamental assumption underlies those statements: that the increased rates will not cause any diversion of traffic. In other words, increased rates, *applicable to present volumes of traffic*, will produce the increased revenue. However, as with these plaintiffs, the increased rates did not produce increased revenues because substantial traffic was diverted from the railroads by the increases. In fact, the increased rates produced an ultimate decrease in revenues and a decrease in contribution over the railroads' out-of-pocket costs. This proves that the Commission's present policy of permitting the increases which the railroads seek, on a mere showing of alleged revenue need, is not only illegal, because not authorized by statute, but illogical and ineffective in achieving the desired end. Therefore, it is the position of these plaintiffs that

* Virtually all regulated industries are subject to this purported problem; few have found it to be a real danger to their financial stability.

properly conducted proceedings before the Commission, which may consume more time than the present type of general revenue proceedings, will not themselves constitute a real danger to the railroads. Instead, based upon proper evidence, the Commission can permit increased rates on that traffic which will not thereby be diverted from the railroads.

Conclusion

For all of the above reasons, it is respectfully submitted that the opinion of the lower court should be reversed and the case should be remanded to it for trial on the merits.

Respectfully submitted,

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Dated: July 16, 1970

APPENDIX

Statutes Involved

Judicial Code

28 U.S.C. §1253

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. §1336

Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

28 U.S.C. §2101(b)

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

28 U.S.C. §2284

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State.

28 U.S.C. §2321

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and

proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.

28 U.S.C. §2322

All actions specified in section 2321 of this title shall be brought by or against the United States.

28 U.S.C. §2323

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

28 U.S.C. §2324

The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

28 U.S.C. §2325

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Government. Organization and Employees—The Agencies Generally: Administrative Procedure

5 U.S.C. §556(d)

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications

for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

5 U.S.C. §556(e)

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

Judicial Review

5 U.S.C. §701(a)

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

5 U.S.C. §702

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. §703

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inade-

quacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5 U.S.C. §704

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. §706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error.

Interstate Commerce Act

49 U.S.C. §1(5)

Just and reasonable charges. All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

49 U.S.C. §3(1)

(1) It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause

any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

49 U.S.C. §13

(1) Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall

appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

(2) Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its motion as though it had been appealed to by complaint or petition under any of the provisions of this chapter, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. Representatives of State commissions sitting with the Commission, under the provisions of this section, in cases pending before the Commission, shall receive such allowances for travel and subsistence expense as the Commission shall provide.

(3) Whenever in any investigation under the provisions of this chapter, or in any investigation instituted upon petition of the carrier concerned, which petition is author-

ized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this chapter or chapter 12 of this title with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records and facilities of such State authorities in the enforcement of any provision of this chapter or chapter 12 of this title.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against, or undue burden on, interstate or foreign commerce (which the Commission may find without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the operations or results thereof of any carrier, or group or groups of

carriers wholly within any State), which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, discrimination, or burden: *Provided*, That upon the filing of any petition authorized by the provisions of paragraph (3) of this section to be filed by the carrier concerned, the Commission shall forthwith institute an investigation as aforesaid into the lawfulness of such rate, fare, charge, classification, regulation, or practice (whether or not theretofore considered by any State agency or authority and without regard to the pendency before any State agency or authority of any proceeding relating thereto) and shall give special expedition to the hearing and decision therein. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

49 U.S.C. §15(1)

(1) Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons

or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed.

49 U.S.C. §15(7)

(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice,

to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just

and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

49 U.S.C. §15a (1) and (2)

(1) When used in this section, the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

49 U.S.C. §17(3)

(3) The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice. The Commission shall have an official seal, which shall be judicially noticed. Any member of the Commission, the Secretary of the Commission, or any member of a board may administer oaths and affirmations and any member of the Commission or the Secretary of the Commission (or any member of a board in connection with the performance of any work, business, or functions referred under this section to a board upon which he serves) may sign subpenas. A majority of the Commission, of a division, or of a board

shall constitute a quorum for the transaction of business. The Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any division, individual Commissioner, or board, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before the Commission or any division, individual Commissioner, or board and be heard in person or by attorney. Every vote and official act of the Commission, or of any division, individual Commissioner, or board, shall be entered of record, and such record shall be made public upon the request of any party interested. All hearings before the Commission, a division, individual Commissioner, or board shall be public upon the request of any party interested. No Commissioner or employee shall participate in any hearing or proceeding in which he shall have any pecuniary interest.

49 U.S.C. §17(9)

(9) When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.